United States Court of Appeals

for the Second Circuit

APPENDIX

Court

75 4096

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

JUANA CORNIEL-RODRIGUEZ,

Petitioner,

- v -

Docket No. 75-4096

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

B
P/S

APPENDIX TO PETITIONER'S BRIEF

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JANUARY, 1976

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LIST OF PARTS OF THE ADMINISTRATIVE RECORD HEREIN CONTAINED

PAGINATION AS IN ORIGINAL COPY

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- X
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JUANA CORNIEL-RODRIGUEZ,
:
Petitioner,
: Docket No. 75-4096
- v -
:
IMMIGRATION AND NATURALIZATION SERVICE,
:
Respondent. :
- X

ORDER TO SHOW CAUSE and NOTICE OF HEARING

Upon inquiry conducted by the Immigration and Naturalization Service, it is alleged that:

1. You are not a citizen or national of the United States;

2. You are a native of Dominican Republic and a citizen of Dominican Republic;

3. You entered the United States at New York, New York on or about September 26, 1967;

4. You were then admitted for permanent residence on presentation of an Immigrant visa issued to you on August 17, 1967 by the American Consul, Santo Domingo, Dominican Republic.

5. You claimed exemption from the required labor certification as the unmarried minor child of a lawful permanent resident of the United States.

6. You were married to Evelio Rafael Marmolejo on September 23, 1967 at Santiago, Dominican Republic.

7. At the time of your admission to the United States you were not in possession of a valid labor certification as required under the privisons of Section 212(a)(14) of the Immigration and Nationality Act and you were not exempt from that requirement.

AND on the basis of the foregoing allegations, it if charged that you are subject to deportation pursuant to the following provisions of law:

> Section 241(a)(1) of the Immigration and Nationality Act, in that, at time of entry you were within one or more of the classes of aliens excludable by the law existing at the time of such entry, to wit, aliens who are seeking to enter for the purpose of performing skilled or unskilled labor and in whose cases the Secretary of Labor has not made the certification as provided by Section 212(a)(14) of the Act, as amended.

A17 536 680
Juana E. Corniel-Rodriguez
Marmolejos

MOTION TO TERMINATE DEPORTATION PROCEEDINGS DATED JULY 17, 1973.

Pursuant to 8 C.F.R. 242.7, I hereby request that deportation proceedings with respect to the above named subject be terminated for these reasons:

1. The Service has failed to prosecute the deportation proceedings which were initiated by Order to Show Cause, dated May 16, 1972. A hearing was held in 1972 but has not been concluded. This is obviously a case of want of prosecution.

2. The pendency of this deportation proceeding impedes action on subject's pending petition for naturalization, filed September 12, 1972. Subject is eligible for naturalization in all respects.

3. Subject is cruelly and inhumanly separated from her child, Osvaldo R. Marmolejos, born April 5, 1970 in Santo Domingo and from her husband because her case is in doubt, subject cannot petition for the admission of her husband and child.

4. This case presents exceptionally appealing and humanitarian factors and should be resolved by terminating proceedings.

TRANSCRIPT OF ORAL DECISION OF THE IMMIGRATION JUDGE, DATED FEBRUARY 6, 1974.

CHARGE: I & N Act - Section 241(a)(1)-Excludable at time of entry - no labor certification, Section 212(a)(14) of the Act.

APPLICATION:

Termination of Proceedings; voluntary departure.

ORAL DECISON OF THE IMMIGRATION JUDGE

DISCUSSION: The respondent is a 25 year old female married alien, a native and citizen of the Dominican Republic who last entered the United States on January 28, 1972 as a returning resident. She was admitted as an immigrant on September 26, 1967 at which time she was in possession of an immigrant visa issued to her by the American Consul at Santo Domingo, Dominican Republic. The visa describes her as being a single female alien who was born on June 24, 1948 and was destined to her father in New York City. The respondent's visa indicated that a labor certification under Section 212(a)(14) of the Immigration and Nationality Act was not statutorily required in her case, obviously because the provisions

of that section exempted her from that requirement as the unmarried minor child of a lawful permanent resident of the United States.

Respondent's visa does not contain any form advising her that she would lose her special status as a child if prior to her application for admission at a port of entry within the United States, she married, and that she would then be subject to exclusion from the United States. The respondent denied she was told by the consul or had any independent knowledge of the fact that she would be excludable if she married prior to her entry. Her mother corrorborated the testimony with respect to the consul's alleged failure to furnish advice with reference for her marital status.

There is no claim that the respondent has any labor certification as required by law or that she was exempt from such labor certification under any provision of the law or regulations.

The record reveals that the respondent was married on September 23, 1967 three days prior to her arrival in

the United States, to one Evelio Marmolejos in Santo Domingo, Dominican Republic. She returned to her husband in the Dominican Republic three times: March 27, 1969 to June 21, 1969, December 3, 1969 to May 10, 1970 and December 10, 1971 to January 28, 1972. On the second trip she gave birth to a daughter on January 26, 1970. Her husband has never been in the United States.

As a married person respondent was not entitled to an exemption from a labor certification and in the absence of such certification was excludable at the time of her entry. Although it is true that the record does not show that the American Consul gave the warning concerning marriage was required under 22 C.F.R. 42.122(d), there is no doubt that the respondent was advised that she would be inadmissible to the United States, because there is a presumption of official regularity which attached to the consular officer's issuance of the visa in question, including his compliance with the provisions of 8 C.F.R. 42.122(d). The respondent and her mother's self serving statements to the contrary have not rebutted this presumption. Matter of Rodriguez 13 I & N Dec. 746.

In any case, absence of the required warning does not affect illegality of such an entry. Therefore an application to subpoena the American Consul was denied.

Upon consideration of all the facts of record, I find that the charge contained in the Order To Show Cause is sustained and that the respondent is deportable as charged.

Respondent has applied for the privilege of leaving the United States voluntarily as an alternative to deportation. There is no evidence that she has ever been arrested or in trouble with the police and there is no record indicating that she has been other than a person of good moral character for the past five years. I therefore do find her statutorily eligible for the requested relief and such relief will be granted as a matter of administrative discretion. She has indicated that if deported she preferred to be sent to the Dominican Republic and no claim of persecution under Section 243(h) of the Immigration and Nationality Act has been advanced.

ORDER: IT IS ORDERED that the application to terminate proceedings to permit respondent to proceed to

a final hearing on a pending application for naturalization in addition to other reasons raised by the respondent be and the same is hereby denied.

IT IS FURTHER ORDERED that the application for the issuance of a subpoena for the testimony of the American Consul who issued respondent's visa be and the same is hereby denied.

IT IS FURTHER ORDERED that in lieu of an order of deportation the respondent be granted voluntary departure without expense to the government on or before thirty days from the date of this order or any extension beyond such date as may be granted by the District Director, and under such conditions as the District Director shall direct.

IT IS FURTHER ORDERED that if the respondent fails to depart when and as required the privilege of voluntary departure shall be withdrawn without further notice or proceedings and the following order shall thereupon become immediately effective. Respondent shall be deported from the United States to the Dominican Republic on the charge contained in the Order To Show Cause.

DECISION OF THE BOARD OF IMMIGRATION APPEALS ("THE BOARD") DATED APRIL 3, 1975.

CHARGES:

Order: Section 241(a)(1), I & N Act (8 U.SC. 1251 (a)(1) - excludable at time of entry - no labor certification, section 212(a)(14) of the Act.

APPLICATION:

Termination of proceedings, or in the alternative voluntary departure

This is an appeal from an order of an immigration judge finding the respondent deportable, denying her application to terminate the proceedings, and granting her the privilege of voluntary departure. The appeal will be dismissed.

The record relates to a married female alien, 25 years of age, a native and citizen of Dominican Republic, who entered the United States for permanent residence on January 28, 1972, in possession of an immigrant visa, classified exempt from the labor certification requirement, because she was the child of a lawful permanent resident. The Immigration and Nationality Act defines a "child" as "an unmarried person," section 101(b)(1) of the Act. The respondent was issued her visa on

August 17, 1967, and was married on September 23, 1967, two days before she entered the United States. Inasmuch as she was no longer a "child" within the definition of section 101(b)(1) of the Act, she was required to have a labor certification. She had none, Therefore, she was excludable.

On appeal, counsel argues (1) that the immigration judge had failed to resolve the issue of fact as to whether or not the respondent had been given the required warning against marrying prior to entry; (2) that the immigration judge erred in refusing to issued a subpoena to the American Consul, who had issued a visa to her, to testify whether he gave the warning against marriage to the respondent.

We reject counsel's contentions. We have consistently held in cases of this kind that even if the holder of a visa does not know that the marriage invalidates her visa and practices no fraud or concealment, she is nevertheless deportable, since she is not of the proper status under the quota specified in the immigrant visa, at the time of entry, Matter of C-, 8 I&N Dec. 665 (BIA 1960);

Matter of Rodriquez, 13 I&N Dec. 746 (BIA 1971); Matter of Coletti, 11 I&N Dec. 551 (BIA 1965). We agree with the immigration judge's conclusion that the respondent was not of the proper status under the quota specified in the visa at the time of entry into the United States. Lacking a labor certification, as well as any proper exemption from this requirement, the respondent is deportable under section 241(a)(1) of the Act.

We agree with the immigration judge that even if the record does not show that the American Consul gave the warning concerning marriage as required under 22 C.F.R. 42.122(d), this would not give rise to an estoppel against the government. Affirmative misconduct, such as official misinformation, has been held to create an estoppel against the United States government, Brandt v. Hickel, 427 F.2d 53 (9Cir. 1970), but misinformation is not alleged here, rather, failure to provide certain information. Such failure does not give rise to an estoppel against the government, INS v. Hibi, 414 U.S. 5 (1973). In Matter of Polanco, Interim Decision 2241 (BIA 1973),

we have held that failure to give the warning mentioned in 22 C.F.R. 42.122(d) does not confer any rights upon a deportable alien. In the circumstances, the denial of any application to subpoena the American Consul was proper. According, the following order will be entered.

ORDER: The appeal is dismissed.

FURTHER ORDER: Pursuant to the immigration judge's order, the respondent is permitted to depart from the United States voluntarily within 30 days from the date of this order or any extension beyond that time as may be granted by the District Director; and in the event of failure so to depart, the respondent shall be deported as provided in the immigration judge's order.

Acting Chairman

Chairman David L. Milhollan abstained from consideration of this case.

TRANSCRIPT OF HEARING BEFORE SPECIAL
INQUIRY OFFICER - JANUARY 23, 1974

Page 1, line 21 to page 3, line 8 inclusive.

***IMMIGRATION JUDGE: Let the record show that prior to the beginning of the hearing an off the record discussion was had by and between both attorneys wherein the attorney for the respondent indicated that he had witnesses whom he would like to testify in this proceeding. In addition he had certain motions of an unusual nature to make and Mr. Ruggiero indicated that he did not wish to proceed today in view of the fact that it would be more expeditious to have the case heard when all witnesses were available. In addition Mr. Martinez indicated that he would like an immigrant inspector subpoena to testify although this witness is employed by the government.

IMMIGRATION JUDGE TO MR. MARTINEZ: Now is this a fair presentation of your remarks, Mr. Martinez?

MR. MARTINEZ TO IMMIGRATION JUDGE: Yes, What I would like to have is a ---- I indicated that since this case had been on the calendar and it had been adjourned that

one of the witnesses wasn't here today and I didn't know it was going to happen exactly and I know we would start I didn't know whether we would finish. We normally do not finish in one session in a case like this, from my past experience. I did want to have a subpoena for the United States Consul who issued the immigrant visa on the issue of notice which I find is an issue in this case. I also wanted to have the government, unless the government is willing to concede, that there were no questions asked that the inspector be brought in who on the date of her admission admitted this alien into the United States. I have two witnesses to present: Her mother who was present at the time that she was issued a visa at the Consular's office in Santo Domingo. We also probably have another witness who maybe able to dispense with.. and I may agree to this later on.

IMMIGRATION JUDGE TO MR. MARTINEZ: Who was the second witness? MR. MARTINEZ: He is a former employee of the United States Immigration.

MR. RUGGIERO TO MR. MARTINEZ; How do you know he is a former employee?

MR. MARTINEZ: How do I know he is a former employee?

MR. RUGGIERO: Yes? Who is he?

MR. MARTINEZ: Attorney Aronowitz?

MR. RUGGIERO: Oh?

MR. MARTINEZ: He's a member of the Bar.

MR. RUGGIERO: What is he going to testify to?

MR. MARTINEZ: As to the proper procedures used by the immigration inspector at port of entry. ***

Page 13, line 8 to Page 15, line 12 inclusive.

*** IMMIGRATION JUDGE: I have before me a letter dated July 17, 1973 which was addressed to the Immigration Judge. A motion was made in a deportation proceeding signed by the respondent's counsel. Now this was addressed to me by the Trial Attorney do you wish to see the letter or you have a copy of the letter?

MR. MARTINEZ: I have a copy of this letter.

IMMIGRATION JUDGE: And you wish me to consider this motion at this time?

MR. MARTINEZ: Yes, sir.

IMMIGRATION JUDGE: I will mark this as Exhibit 2.

IMMIGRATION JUDGE TO MR. RUGGIERO: Any objection Mr.RUGGIERO?

MR. RUGGIERO: No.

IMMIGRATION JUDGE: Al right. I will take each point one at a time.

1. Your attorney moves that these deportation proceedings be terminated for the following reasons:

1. That Service failed to prosecute the deportation proceedings which were initiated by Order to Show Cause, dated May 16, 1972. A hearing was held in 1972 but has not been concluded. This is obviously a case of lack of prosecution.

IMMIGRATION JUDGE TO MR. MARTINEZ: No I believe Mr. Martinez that we have already commented that your client failed to appear on two different occasions 1972 and it is not the government that lacked prosecution but apparently your client by failing to appear that this hearing was not initiated. To my knowledge no hearing was held in 1972. Can you enlighten me as to when this hearing was held. What are you talking about?

MR. MARTINEZ: No hearing was held, no sir.

IMMIGRATION JUDGE: Well, why did you say a hearing was held if you look at --------

MR. MARTINEZ: A hearing was noted, there probably was an error.

IMMIGRATION JUDGE: I will deny that deportation proceedings be terminated based on allegation I for the simple reason that the attorney admits that the language is improper and inaccurate.

2. The pendency of this deportation proceeding impedes action on subject's pending petition for naturalization, filed September 13, 1972. Subject is eligible for naturalization in all respects.

IMMIGRATION JUDGE TO MR. MARTINEZ: If your client is deportable from the United States then she is not eligible for naturalization in all respects, and with respects, and with respect to the fact that this has been pending so long your client is as much to blame as anyone else. The proceedings will not be terminated on point number 2. With respect to point number 3 that the subject is cruelly and inhumanly separated from her child, born April 5, 1970 in Santo Domingo and from her husband because her case is in doubt, subject cannot petition for her husband and child. The respondent was entitled to leave the United

States at any time since she was admitted here in 1967 and is she had a proper immigrant visa she would have been able to return at any time with her alien card. This was either her own doing or her lawyer's advice and for that reason the proceedings will not be terminated based on number 3 of Exhibit 2. And lastly you say the case presents exceptionally appealing and humanitarian factors and should be resolved by terminating proceedings. I think that we will have to wait on that. I haven't heard enough evidence yet in this proceeding to determine whether there are appealing humanitarian factors to consider in your client's favor. I will deny this motion in all respects. Do you have any other motions to make? ***

Page 17, line 7 to line 18, inclusive.

*** MR. MARTINEZ TO RESPONDENT:

Q. Mrs. Corniel do you know what a labor certification is?

A. No.

Q. In answer to Mr. Ruggiero's question you said that you have never received one. I f you do not know what is is how do you know that you have not never received it?

MR. RUGGIERO: I object that is argumentative.

IMMIGRATION JUDGE: Overruled.

IMMIGRATION JUDGE TO RESPONDENT:

Q. Ma'am did you ever ask for permission from the United States government to work in the United States before you came into this country?

A. No. ***

Page 27, line 1 to Page 31, line 6.

MR. MARTINEZ: I have no objections. I would like them to be a matter of record that the government establish its case with the evidence of the consul where the consul testifies as to the notice.

IMMIGRATION JUDGE: Well, Mr. Martinez, I am going to deny the motion to subpoena the consul. You may reserve your rights for the purpose of any appeal. You also asked for the immigration inspector. Do you still wish the immigration inspector?

MR. MARTINEZ: No, I just want the consul.

IMMIGRATION JUDGE: The consul subpoena was turned down. The only witness you have left is the mother? Do you wish the mother to testify?

MR. MARTINEZ: No.

IMMIGRATION JUDGE: All right. Let the record show that in liew of having the respondent's mother present as a witness that a stipulation has been entered into by and between both counsel. Is that correct Mr. Martinez?

MR. MARTINEZ: Yes.

IMMIGRATION JUDGE TO MR. RUGGIERO: Mr. Ruggiero?

MR. RUGGIERO: That if the mother was to testify as the counsel has stated she would state she was present with the respondent at the time the respondent was interviewed in the office of the American Consul, Santo Domingo, Dominican Republic at which time the respondent wasn't given any advice regarding what a marriage subsequent to the issuance of the visa would cause.

MR. MARTINEZ: Of the special immigrant status.

MR. RUGGIERO: Of the special immigrant status.

IMMIGRATION JUDGE TO MR. MARTINEZ: Are you satisfied then Mr. Martinez that respondent's mother does not have to appear?

MR. MARTINEZ: Yes, because the stipulation is all that is referred to.

MR. RUGGIERO: I do not concede this to be true.

IMMIGRATION JUDGE: Yes, I understand.

IMMIGRATION JUDGE TO MR. RUGGIERO: Mr. Ruggiero?

MR. RUGGIERO: Yes, I would like an oral amendment to the order to show cause that she last entered the United States on January 28, 1972.

IMMIGRATION JUDGE: Another allegation?

MR. RUGGIERO: Yes.

IMMIGRATION JUDGE: Are you offering additional allegations to the original charge of deportability?

MR. RUGGIERO: I am offering---yes, just an allegation to the charge of deportability.

IMMIGRATION JUDGE: The original charge will remain the same.

MR. RUGGIERO: The original charge will remain the same.

IMMIGRATION JUDGE TO MR. MARTINEZ: Do you accept the copy of the Form I-261 with the additional allegations of 8 and 9?

MR. MARTINEZ: Well, I haven't received them as soon as they have been served on her I am going to accept them.

MR. RUGGIERO: Do you have your receipt sir?

MR. MARTINEZ: Yes.

IMMIGRATION JUDGE: I am going to mark the Form I-261 which contains the additional allegations as Exhibit 5.

MR. RUGGIERO: There is a special addition to allegation 9.

IMMIGRATION JUDGE TO MR. MARTINEZ: Do you waive the seven day notice of the Service?

MR. MARTINEZ: Yes, I will waive the seven day notice.

IMMIGRATION JUDGE: All right.

IMMIGRATION JUDGE TO RESPONDENT:

Q. Is it true that you last entered the United States on January 28, 1972 as a returning permanent resident?

A. Yes.

Q. And is it also true that you did not have an approved labor certification at the time that you returned on Jan[illegible] 28, 1972?

A. .....

Q. Did you have a labor certification at the time that you last entered on January 28, 1972?

A. Well, I came in with my passport.

Q. Did you have any other documents?

A. I had my residence card.

IMMIGRATION JUDGE TO MR. MARTINEZ: Well, do you concede the truth of allegations number 9 Mr. Martinez?

MR. MARTINEZ: I want to know from the government is the government's contention that every time an alien returns to the United States that you must have a new approved labor certification or an additional labor certification. Well, I just want to know what is the government's contention I don't understand it?

MR. RUGGIERO: Well, she needed one or the other certification.

MR. MARTINEZ: Well, I just want to know what was the government's contention I don't understand it.

MR. RUGGIERO: She needed one in the first place; therefore she needed one in any instance.

IMMIGRATION JUDGE TO MR. MARTINEZ: In other words Mr. Martinez what the government is saying is that the respondent was required to have a labor certification on one of her returns to the United States.

MR. MARTINEZ: May I ask an import question?

IMMIGRATION JUDGE: Well, we are still on allegation number 9. Do you concede the truth of allegation number 9?

MR. MARTINEZ: I will deny the allegation.

IMMIGRATION JUDGE: All right allegation number 9 is denied.

IMMIGRATION JUDGE TO MR. MARTINEZ: Are you resting Mr. Martinez? Now do you wish to call Mr. Aronowitz as a witness?

MR. MARTINEZ: Yes.

IMMIGRATION JUDGE: Is that all?

MR. MARTINEZ: I may wish to submit a brief.

IMMIGRATION JUDGE: There is no need for a brief Mr. Martinez. If you wish to raise them on appeal. As soon as Mr. Aronowitz's testimony in given I will be able to render an oral decision based on the evidence in the record. Unless Mr. Aronowitz's testimony will be of such nature that will warrant me to reserve decision, I expect to render a decision at that time, do you understand?

MR. MARTINEZ: I called Mr. Aronowitz but he was not available today.

IMMIGRATION JUDGE: All right thank you. The case is adjourned until February 4, 1974 which is a week from Monday at 2:00 P.M.

MR. MARTINEZ: For Aronowitz only?

IMMIGRATION JUDGE: For Aronowitz only. We hope to finish the case at that time.

MR. RUGGIERO: She doesn't have to come.

MR. MARTINEZ: No, she doesn't have to come.

MR. RUGGIERO: No, she only has to be here at the hearing.

IMMIGRATION JUDGE TO MR. MARTINEZ: Mr. Martinez, look she is the respondent. Have her present.

IMMIGRATION JUDGE: Hearing is adjourned.

PETITION FOR REVIEW TO U.S.C.A.2ND CIRC.

AMENDED PETITION FOR REVIEW

Petitioner Juana Estela Corniel-Rodriguez, A17 536 680 by her attorney, respectfully prays that this Court review the final order of deportation entered against her by the Board of Immigration Appeals, Exhibit 'A'. No review of such order has been had in any other Court.

New York, N.Y.
June 17, 1975.

ORAL ARGUMENT BEFORE THE BOARD OF IMMIGRATION APPEALS DATED JULY 22,1974

Miss Wilson: We'll hear from you in the Corniel case now, please Mr. Martinez.

Attorney: Yes, this Corniel case is one case in a series of cases where the persons have been minors who married prior to entry and have faced deportation proceedings.

One of the first leading cases on this subject was Matter of Rodriguez, which has been reported by the Board; and, this case is to be distinguished from that case, in that in this particular case, Miss Corniel did not sign to the disputed Form F.S. 548.

I should like to point out to the Board's attention, what was happening at this time in the Dominican Republic, and it is simply this; in 1965, October 3rd, the law was changed.

Prior thereto, there had been no quota in the Western Hemisphere, and any child that married prior to entry, was not required to sign any form, because there was no quota and there was no necessity for Labor Certification, and as opposed to the Eastern Hemisphere - in

the Eastern Hemisphere, what the situation was different.

I haven't checked the statutory reasons of Congress changing and making these precise definitions of 'child'. I can see from some early decisions of the Board with respect to some Italian cases where the Italian parent attempted to bring the child and that child became married under the quota and there were so few quota numbers available, that I believe that Congress felt it became necessary to do something about this situation to correct this.

And so that at one point, this regulation regarding the written warnings against marrying before entry, was (unintelligible) in 22 C.F.R. Now, but in the Western Hemisphere there was no quota and at any time a child could get married prior to visa issuance or subsequent to visa issuance.

The custom was that after a person obtained a visa, in order to assure in the future reunification of two loved ones, they celebrated a marriage. And so that, it really didn't make a difference, because the quota limitation in the Western Hemisphere did not go into effect until June 30, 1968.

In this particular case, Juana Corniel did not take up a quota number, under the Western Hemisphere limitation, because when she came in it was not necessary.

However, it is true that according to the statute of 101...the term "a special immigrant" under which she came in...she was a special immigrant who was born in the Western Hemisphere and she was following, to join someone (her father) who she testified asked for her.

Now, the Consul could not issue a visa to her, until he was in receipt of a determination made by the Secretary of Labor, pursuant to section 212(a)(14). If she was not a child, but at that point, when she went to get the immigrant visa, she did not need a Labor Certification.

She was then nineteen years of age. She was a child with her father in the United States, who had filed an application for verification of lawful entry, and who was trying to get her to join him.

In fact, she says (and I think it is very important) in her F.S. 510, as to her purpose in coming to the United States at the time - she says:

"I am going to be /Spanish/"

That means "to be with. together with my father." That was her purpose in going to the United States. She didn't have any other purpose at that time.

She had no fixed purpose of coming to work, or of doing anything. I'm sure that no one could tell.. no one can reasonable tell, of course one can have a plan of what was their proposed plan of action upon arriving in the United States?, but she didn't know exactly what she was going to do, except to "be together with my father."

She could have come up to the United States and returned. Or, she could have come up to the United States and gone to school; or she could have gone to the United States and stayed at home, and taken care of her father, and not have worked.

But, apparently work is the lot of mankind, and she did come into the United States, and at an unknown time within two years, she worked. She did not have an extensive education, as the record will reveal. She had a five years schooling.

Mr. Torrington: Counsel, she came in two years after the law was changed. Did she not?

Attorney: Yes, but she came...yes, but she came in in 1967. She came in, as the Order to Show Cause charges, she was admitted at September 26, 1967. Of course, that was her time of original entry for permanent residence.

The quota went into effect on June 30, 1968. So, at the time that the Consul issued a visa to her, he probably issued it to her, without the necessity to make any determination, because according to her statement, she was going to join her father and she was exempted from a Labor Certification, because she was the child of a lawful permanent resident.

And, at that point, she was not given any written warning against marrying before entry, although it was a statutory duty to the Consul. It was an affirmative action to be taken on his part as mandated by the Visa Manual and by 22 C.F.R. 42.122, where it states the Consul or officer shall warn an alien, when appropriate, that he will be inadmissible if such immigrant...if he

not married at the time of application for admission, or if he fails to apply for admission at a port of entry into the United States, before reaching the age of 21.

The Consul had this positive, affirmative duty of conduct to perform, and he failed to do so, because as you can see, in other line of cases cited by the Board, there was a form there, at the Consul; and, although I dispute in these other line of cases, procedurally as to how this was done, this was not done here at all.

And, as you see in my brief, it relates to the Visa Manual and what the Visa Manual dictates as affirmative conduct to be performed by the Consul.

Now, we went in our testimony, further into this. There was no warning, no notice. She didn't know. She was an alien abroad, who could not have known the Immigration Laws of the United States.

And, although the Service felt that she could have known, they could have asked her at the hearing, but none of this was brought out.

Now, she came in '67 and she returned to the Dominican Republic, as the record will indicate, because she became pregnant and she was so ignorant of the Immigration Laws of the United States, that although pregnant and about to have child, she returned back to her husband to join her husband, to give birth to the child there, not knowing that if she had her child born in the United States, which she could have had, this child would have exempted her again from the necessity for Labor Certification.

Mr. Torrington: Counsel, you mentioned before, too, that actually at the time of her first entry, she was exempt from the Labor Certification requirement.

Attorney: Yes.

Mr. Torrington: Is that correct?

Attorney: Yes, sir.

Mr. Torrington: Isn't that exemption limited to a child, and was she still a child, within the meaning of the provision?

Attorney: At the time she was issued the visa, she was a child.

Mr. Torrington: But at the time of entry?

Attorney: That's where we have the problem, because at the time she was issued the visa, she was a child and the visa was issued properly to her. But, subsequently, prior to entry, she became married; and then she entered the United States.

Mr. Torrington: So, at the time of entry she did need a Labor Certification if she was no longer a child, as in the meaning of the definition of a 'child' in the Act.

Attorney: Yes, sir.

Mr. Torrington: Isn't that correct?

Attorney: That is correct.

Mr. Torrington: Thank you.

Attorney: Yes, because at the time she was statutorily required to have...if she was coming to work. Now, let me qualify that, Mr. Torrington. If she was coming to work, the immigrant inspector at the port of entry, has a duty to inspect an alien arriving at a point of entry, and to ask him certain questions - What are you coming here for?

Because, there is no presumption that an alien abroad is coming to work; and, this presumption has been stated in writing to me, by the State Department. I did not annex it with this file because I did not feel that it was relevant to...or material.

But, depending on what questions she would have been asked by the immigrant inspector, and determining on her answers to those questions at that time, only then can one really answer your question fully, to advise you whether or not she did require the Labor Certification, because she was coming to join her father - was her intention at the time she got the visa.

She entered the United States shortly after the issuance of the visa. Now, she has indicated statements which are part of the record, as to her knowledge of the Immigration Laws, as to the fact of non-notice, as to what she would have done if she had known, because if she had known, she would have made an entry into the United States and returned immediately, because Puerto Rico is only 45 minutes away by airplane

and it is only a $50 round-trip today, and I think that period in '67, it was round $35 round-trip.

If she had known and wanted to protect her visa rights...but, this is where there is a failure on the part of those who are required to act and who didn't act by asking proper questions.

Because, at the port of entry they ask questions today. They are more aware. At that time, I don't know know what was asked. All I know is that she was admitted by an immigration officer, and she testified... in the record there is testimony as to this.

And, in order to attempt to settle the controversy about the issue raised by the Board in Matter of Rodriguez, about the presumption of official regularity in the Consular's acts, in this case we requested a subpoena, upon the Consul, but the immigration judge refused to issued that subpoena.

So, we've been placed in a "damned if you do and damned if you don't" situation, because if we do ask for a subpoena, we are refused a subpoena and, if we don't ask for it...if we do ask for it, they say it is purposes of delay.

This is the problem with this situation, that there is administrative defects in the procedures below. The interests of justice and the requirements due process requires that in an appropriate case, there should be some pretrial procedures. I don't say in every case, but I say in certain cases where there are certain equities.

Pretrial procedures should be carried out to the limit, to narrow the issues, to avoid surprise, and to provide for discovery. Certainly pretrial procedures would simplify the issues, and would limit the expert witnesses and would provide for termination of discovery.

But, in the ordinary administrative procedures case of this type, one cannot plan because one does not know if one is going to be reached that day. It is very difficult and here we have been substantially prejudiced, because of the failure to have a subpoena or at least to have the opportunity to take interrogatories, which we requested.

Now, in fact the plaintiff's innocent conduct is such in this particular case, she has never been convicted of a crime; she is not an immoral or a subversive.

She was eligible to apply for naturalization, because she has had the time here, and so we filed the petition on her behalf, for naturalization... when she became eligible and nothing happened.

And, at one point in the proceedings, we made a motion, This motion was of July 17, 1973, to terminate the proceedings. All of these motions were finally heard at the time of the hearing.

And, the immigration judge denied the motion. Now, we feel that certainly the Board should look at the procedural rules in situations of these type where there has been innocent conduct on the part of the respondent.

And, I do request that the Board consider the granting of estoppel in cases of this type, against the Service. The Supreme Court indicated, in the Hibi case at 414 U.S. 5, that affirmative misconduct might estop the government from denying citizenship, which is related to the possession of status, possession of licensing which I prefer to characterize it as, because the definitions of the visa issuing process by the Consul and all of the functions of the Immigration Service, I consider them to be licensed, as defined under the Administrative Procedure Act.

The Gestuvo case is a well taken case of the issue of estoppel. This is reported in 337 F. Supp. at p. 1093. According to the Gestuvo case, which is a Ninth Circuit decision, there are four elements which are necessary for estoppel. For the party to be estopped, the Service must know of the facts.

Now, here you have - and this is another problem - you have two parties and they apply the immigration law. You have the Consul and you have the Immigration Service. You have...of course both represent the interest of the United States Government or the Attorney General. And, he knows the true facts and he has a duty to act affirmatively in a situation where his regulations provide that in the case where the person is of marriageable age (and she was 19) there is a duty to warn.

There was no warning. And, where the party intends that his conduct be acted upon by the issuance of the visa and the entry into the United States is permitted by the Immigration Service, and the

respondent is here...is ignorant of the true facts, and there is a reliance (unintelligible) by the party and now he is injured by these deportation proceedings, because she may be deported, unless the board rules otherwise.

Well, we have the four necessary elements to create estoppel, and I think the Board should condider in certain situations, to grant estoppel against the Service. Certainly it aides in the administration of justice and improves the administration of the Sertice.

And, I should also respectfully request the Board see the case of U.S. v. Lazy F.C. Ranch (phonetic) cited in 481 F.2d at 984 where estoppel is discussed agains as available as a defense if it works a serious injustice and if the public interest would not be unduly damaged.

Now, in this case, the public interest is not going to be unduly damaged if she were to continue to be a permanent resident. It could certainly work a serious unjustice on this young lady, who is

a person of good moral character who want to become a part of the United States by becoming a United States citizen.

And, where estoppel...where the government is acting in a sovereign capacity as in this case, as distinguished from a proprietary one; and, there is no issue of proprietary in this line of cases.

The situation goes so far, that her legal permanent resident has been verified by the Service, in Juana's case. The Service did verify that she is a lawful parmanent resident, and subsequently they proceeded to deport her, because after she entered, she brought her mother into the United States, as an exempt Labor Certification.

Now, there's no real problem in this case, because right now we have a limitation of...Congress tells us...tells the Service how many person to bring in - 120. When she came in, she didn't have this problem.

Of course she wants to be reunited with her spouse and her child, in the Dominican Republic -

who for five or more than five years...1967, it is 1974 now, nearly seven years...she has not been able to become reunited with them, here in the United States where she prefers to remain because it is the land of economic opportunity and educational opportunity and because it is the land next door to the Dominican Republic where people go in and out frequently.

She wants to do this; she wants to become a citizen, and she has been denied although she is a person of good moral character under the regulations. We made the motion.

Miss Wilson: Mr. Martinez, you've used almost all of your half hour, perhaps you'd like to save the remaining few minutes for rebuttal?

Attorney: That would be fine.

Miss Wilson: Fine. Mr. Milhollan?

Mr. Milhollan: I believe all of the arguments raised herein, particularly that of estoppel, were either directly decided by or can be answered by Matter of Polanco, Interim Decision 241, decided by the Board on November 8, 1973. And, unless the Board has some questions, that's all I have.

Miss Wilson: Mr. Martinez?

Attorney: I recall...as I recall, Polanco is one of my cases. I don't recall the exact decision in that case. I say that this one is a...I don't recall whether Polanco executed or not the statement.

I don't recall if Polanco entered prior to '68 or after '68. I think that each case falls on its own peculiar facts, dates which are relevant in each particular case.

I'd just like to point out to the Board that there is a sworn statement in the file and the Board should examine it, as well as the 510, and as well as the other applications made during the course of the child; and, should act to improve the procedures in these situations, so as not to prolong them and so as to narrow the issues and then to get it expeditious.

Miss Wilson: Thank you. We'll give this careful consideration.

Thomas J. Cahill (PZ)